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## LAWYERS MEET THE LAW: CRITICAL U.S. VOICES OF HELMS-BURTON\*

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\* This article should recognize, above all, the generous and unconditional encouragement received from my colleague and friend Enrique Baloyra in what was probably his last editing activity before his untimely death in July of 1997. As an unsolicited response to a simple query for informal comments on a tentative version of an initial draft paper, he decided to put it through the customary review process. This decision led to the eventual publication in the form of an article entitled *The Helms-Burton Law: Development, Consequences, and Legacy for Inter-American and U.S.-European Relations* in the *Journal of Inter-American Studies and World Affairs*. It was preceded in Spanish by a brief article entitled *Origen, desarrollo y consecuencias de la ley Helms-Burton*, published in the *Anuario Iberoamericano* and compacted in a short essay titled *Auge y caída de la ley Helms-Burton*, published in *Leviatán*, *Archivos del Presente*, and *Encuentro*. Among the colleagues, officials, and assistants who have contributed according to their generosity and special capacities are Ambler H. Moss, Angel Viñas, Robert Kirsner, Anna Krift, and Eleanor Lahn. The staff of the following libraries and institutions should receive proper credit for facilitating the use of difficult-to-find sources: the Richter Library and the Law School Library of the University of Miami, the Law School Library of the University of Barcelona, the CIDOB Foundation of Barcelona, the Instituto de Relaciones Europeo-Latinoamericanas (IRELA), and DGI and DGVIII of the European Commission.

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## I. INTRODUCTION

When the United States Senate and House of Representatives inserted a number of adjustments into the basic text of the Cuban Liberty and Democratic Solidarity (LIBERTAD) Act (hereinafter the "Helms-Burton Act") in late 1996, it caused some major developments and consequences. These events and fallouts are complex as they have affected dozens of states and international organizations, concerned hundreds of companies in many nations, risen the hopes of thousands of Cuban-Americans, generated multiple political protagonists, consumed substantial column space in newspapers and weeklies in three continents, and engaged the energies of literally hundreds of government officers and scholars. It is still early to evaluate the true profile of the legacy of the law and its impact on U.S. international relations and domestic politics.

Some of the events are well-known to the public, while others exist only in boardrooms or in the pages of academic journals. Nevertheless, all have a common origin: the Cuban Revolution and the confrontation with the United States. This latest chapter of the U.S.-Cuba friction has some unique features. These features are the indirect object of this article. However, a tentative balance is in order. First, let us consider the basic pivotal events.

The first event is the criminal shooting of two Cuban exile planes a few miles off the coast of Havana, Cuba on February 24, 1996. This event shattered all possibilities of rapprochement between

the U.S. and Cuba. Second was President Bill Clinton's apparent compulsion to sign the Helms-Burton bill on March 12, 1996. Third, as an example of the world's displeasure with the law, the European Union (hereinafter "EU") decided, in the fall of 1996, to enact a Regulation (complemented by a Joint Action) as a blocking measure against the U.S. move, while announcing its intent of placing this issue in the framework of the World Trade Organization (hereinafter "WTO"). As a confirmation of its standing policy of conditioning cooperation aid packages, the EU also issued a Common Position detailing the requirements to be met by Cuba in order to become a beneficiary of a cooperation aid agreement.

Fourth, on April 11, 1997, as a sign of mutual concern for the looming confrontation between close economic and political partners, the EU responded to the partial suspension of the law and the promises to extend its neutralization by entering into a pact (confirmed by a May 1998 Understanding) with the United States that would in essence freeze the impact of the Helms-Burton Act. Finally, the death of Cuban exile Jorge Mas Canosa, a major force behind the Helms-Burton Act, on November 23, 1997, generated many questions about the overall U.S.-Cuba relations, and the future of many of the projects and enterprises which he helped to develop. Among these projects are the Cuban-American National Foundation, Radio and TV Martí, and a financial lobby in Washington.

The Cuban political transition, a final decisive development, will be the closing chapter of the recent stormy relationship between the U.S. and Cuba. Whether this is done with or without the presence of Fidel Castro is irrelevant for this analysis. The scope of this essay is limited to some of the legal aspects (especially domestic) of the Helms-Burton Act while Cuba is still ruled according to a dictatorial, Marxist-Leninist regime, moderately alleviated by a series of openings in the economic policies.

With the law partially neutered by President Clinton through subsequent suspensions of its thorny part, in addition to a truce compromise signed with the European Union, a serious international

confrontation has been defused. However, the legacy of the law is composed of the consequences of its simple enactment. At least several by-products can be considered. First, there is the impressive unanimity shared by the U.S. commercial partners and political allies in opposing the measure. The law has given mainly Canada, Mexico, and the member states of the European Union (in unison or separately) a unique opportunity to show an autonomy from the overwhelming presence of the only superpower. At the same time, the Helms-Burton Act has prompted some foreign actors to confirm and mildly reshape their relations toward Cuba. While opposing the Helms-Burton Act, the rest of the world has shown signs of inducing Cuba to reform and respect human rights. In some countries, which have "special" relations with Cuba, the law and its controversies have served to rekindle internal confrontations. Second, the Helms-Burton Act has given Cuba an additional life-saving mechanism to blame the increasingly negative economic situation of the U.S. embargo.

Third, although the law has proven to be ineffective politically and economically, in the domestic arena it has served to strengthen the electoral power of its main backers. The Helms-Burton Act has supplied the core of the Cuban exile community with a guarantee that the policy toward Cuba will remain the same by virtue of the codification of the requirements for an eventual softening of the embargo. These conditions include a concrete democratization process to be developed in Cuba with the political disappearance of the current leadership. Finally, the controversial legal profile of the Helms-Burton Act has attracted not only the attention of foreign interests, but it has also intrigued U.S. legal scholars on grounds as sensitive as extraterritoriality, violation of international law, and the citizenship conditions needed in order to enjoy the protection of U.S. courts. The Helms-Burton Act may have become a case study for generations of law students to inspect. This is the central topic of this article.

Any analysis of the origin and consequences of the Helms-Burton Act has to take into account two distinct and complementary dimensions. The first is the narrow issue of relations between the

U.S. and Cuba; and the second is a broader and more diffuse picture of strategic thinking emanating from the economic and political decision centers of the United States.

Focusing on the narrow U.S.-Cuba relationship, it is obvious that the objective of the United States government's Helms-Burton Act has been fundamentally political. It is aimed at discouraging foreign investment in Cuba through the threat of lawsuits and the imposition of travel restrictions to the U.S. by foreign executives whose companies "traffic" in stolen properties. More fundamentally, it seeks to generate a deeper economic deterioration to accelerate the fall of the current Cuban regime. The Helms-Burton Act is the culmination of the evolution of the U.S. political attitude toward Cuba<sup>1</sup>. As its own juridical chronology shows, all U.S. legal actions have been responses to the inexorable inclination of the Cuban government toward the Soviet political and economic orbit.

As a prelude to future changes, Cuba began to foster economic reforms and investment. In 1982, Havana approved a law to regulate the activities of business consortia,<sup>2</sup> along with possibilities for long-term leases of properties. Labor regulations were modified in 1990 to facilitate the establishment of tourism-related enterprises. Finally, in 1992, some parts of the Cuban constitution (Articles 14, 15 and 18) were adapted to soften the prevailing Marxist-Leninist intransigence against private enterprise. Accordingly, a series of successive measures were taken resulting in a modest opening to economic activities, which are the basis of

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1 See Lynn Stoner, *Recent Literature on Cuba and the United States*, 31 LATIN AM. RES. REV. 235 (1996) (a useful starting point for a review on the relations between the United States and Cuba); see also Pamela Falk, *the U.S.-Cuba Agenda: Opportunity of Stalemate*, 39 J. INTER-AM. STUD. & WORLD AFF. 153(1997)(one of the most recent accounts of pending items).

2 Decreto-Ley Número 50, sobre asociación económica entre entidades cubanas y extranjeras [Legislative Decree No. 50, Economic Association Between Cuba and Foreign Entities], Gaceta Oficial, Special Ed. No. 3, Feb. 15, 1982.

capitalist markets. In September of 1995, Law No. 77 was issued to regulate foreign investment, in place of Law No. 50 of 1992. The results of these measures were rather slow to arrive<sup>3</sup>. However, according to the Cuban government, the change was noticeable. By the end of 1994, about 140 joint ventures were operating in Cuba. At the end of 1995, a total of 212 were formed.

For more than thirty years, the U.S. did not seem to pay too much attention to the properties that were taken as a result of the nationalization process decreed by the Cuban Revolution. Washington and Havana never came to terms in negotiating a settlement. While the U.S. insisted on full compensation, the Cuban authorities responded that they should be compensated for the damage caused by the U.S. embargo. The consolidation of economic links with Cuba was guaranteed to encounter serious obstacles. In the 1990's, all investments became potential targets for future confiscation and retaliation emanating from a new twist in U.S. policy. The immediate translation took the form of a congressional bill, the Cuban Democracy Act (CDA), later known as the 1992 "Torricelli Act."

For some influential figures, the embargo and its initial codification through the Torricelli Act was not enough. The Torricelli Act was still a weapon with limited and indirect impact. It had no political teeth, so to speak, especially in the international arena. The Helms-Burton Act was left to redress this limitation.

Once in motion, the perception of this piece of U.S. legislation, both in the U.S. and abroad, was extremely negative. Most efforts of finding redeeming values in the evolution and impact of the Helms-Burton Act are reduced to the understandable litany of self-serving praise from its main advocates in Congress. While the hard-line sectors of the Cuban-American exile community have had good words and expectations for the law, some moderates warned

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3 CARMELO MESA-LAGO, ARE ECONOMIC REFORMS PROPELLING CUBA TO THE MARKET? (1994) (for a lucid global analysis of the reforms).



that it could actually prolong Castro's rule. The overall record of commentaries is a dismal example of concern and anger. Too many voices focus on the unnerving issue of violation of international law. In the United States, harsh words such as: a "bad law,"<sup>4</sup> a "dangerous precedent,"<sup>5</sup> an "undermine [of] the confidence in the international legal order,"<sup>6</sup> a "blatant illegality,"<sup>7</sup> and "one of the worst mistakes"<sup>8</sup> made by the U.S. (by former President Jimmy Carter) characterized the Act. Harvard Professor Jorge Dominguez, one of the most respected specialists on Cuba, has referred to it as a "dictatorship-enabling act."<sup>9</sup> Normally tame, U.S. jurists referred to the Helms-Burton Act as "irrationality at its maximum."<sup>10</sup> Even incensed foreign governments have commented on the law by equating it to a "declaration of economic war."<sup>11</sup> Setting aside political opinions and commentaries regarding foreign policy, this comment concentrates on the legal analysis offered by the U.S. juridical community.

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4 See Anthony M. Solís, *The Long Arm of U.S. Law: The Helms-Burton Act*, 19 LOY. L.A. INT'L & COMP. L.J. 709, 740 (1997).

5 *Id.* at 729.

6 *Id.* at 740.

7 Susan J. Long, *A Challenge to the Legality of Title III of LIBERTAD and an International Response*, 7 IND. INT'L & COMP. L. Rev. 467, 496 (1997).

8 *Weekly Notes* . . . , Wash. Times, Jan. 28, 1997, at A14.

9 See Jessica Mathews, *This Misguided Plan to Punish Cuba Would Backfire*, INT'L HERALD TRIB., Apr. 5, 1995.

10 See Luisette Gierbolini, *The Helms-Burton Act: Inconsistency with International Law and Irrationality at Their Maximum*, 6 FLA. ST. U. J. TRANSNAT'L L. 289 (1997).

11 *Caribbean Reacts to Proposed U.S. Law: It is Designed to Deter Closer Trade Links with Cuba*, LATIN AM. WKLY. REP., Aug. 19, 1997, at 390.

## II. THE LEGAL RESISTANCE

A. *Mea Culpa*

In the future, when historians proceed to unearth what predictably will be left of the Helms-Burton Act, they will be able to easily distinguish between the ephemeral dimensions and the lasting consequences. Predictably, the negative legacy is probably going to surpass the accomplishments that the advocates of the law were seeking, mainly the speedy demise of the Cuban dictatorship. History will probably forget most of the controversies and confrontations generated by the Helms-Burton Act. In the not too distant future, memories will fade away about the chasm that it has opened between the U.S. and the European Union. The impact inflicted in the inter-American relations network will probably not reach the seriousness of other historical episodes that include military interventions in the Dominican Republic and Panama, not to speak about the Bay of Pigs and the missile crisis. Disagreement with Spain over the Helms-Burton Act will probably just become another chapter of the intriguing triangular relationship between Madrid, Washington, and Havana. To sum up, in time, history — to use a rewrite of perhaps the most famous of Castro's expressions — may well forget the Helms-Burton Act.<sup>12</sup>

However, the Act has provided a unique opportunity for students and legal scholars to observe in theory, if not in practice, one of the most peculiar legal creations ever issued by the U.S. Congress. While this comment is being written, the Helms-Burton Act is becoming a legal case with the potential of capturing a spot in the legal annals.

What is fascinating about the perception of the law is not the

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12 See FIDEL CASTRO, HISTORY WILL ABSOLVE ME (Editorial de Ciencias Sociales, La Habana ed. 1975) (paraphrasing the famous expression by Fidel Castro which gave title to one of his most quoted essays).

fact that customary, rushed commentaries, protests, and endorsements were generated as soon as it was approved, but that the Helms-Burton Act has consumed considerable energy within the legal community. This was predictable if one takes into account the precedent of the legal studies produced on the long U.S. embargo against Cuba and the Torricelli Act. It was expected that law scholars would explore the Helms-Burton Act's potential unconstitutionality and possible violation of international law.

The intimate linkage between the political origin and the legislative evolution of the Helms-Burton Act was bound to become a favorite topic for U.S. jurists. In spite of the traditional disciplinary resistance of academic institutions and publications, the Helms-Burton Act has offered a fitting opportunity for commentaries that simultaneously take into account the legal and political aspects of the law. While it was expected that political commentators would offer policy recommendations and venture strong opinions, it is significant to note that law specialists have been issuing something other than their usual insightful analysis of the law. Jurists have also inserted frequent political opinions in their studies. Moreover, they have carried out this task in the mainstream journals dedicated to international law and the network of regulations affecting transnational arrangements and organizations.

However, what is also extraordinary is the notable attention generated by the scholarly community toward the subject, as well as the depth of the multiple analyses produced, which match the political commentaries. A result of the rigorous scrutiny is the degree of negative criticism. This becomes apparent when the bulk of the studies are compared with the mild and scarce response offered by legal scholars and practitioners who have justified the law as juridically acceptable and politically efficient. As expected, very early in the process, attorneys offered their services to potential plaintiffs and defendants. Some lawyers even drafted convincing

pieces endorsing their particular point of view or concern.<sup>13</sup> These commentaries help in completing the picture, but have to be taken as what they are: professional announcements from lawyers defending the interests of their clients.

More important is the realm of scholarly publications. Considered as a whole, a negative perception of the Helms-Burton Act would be expected to come from non-U.S. sources. However, what is striking about the academic corpus to be considered is the fact that an overwhelming number of the negative cases of analysis are U.S.-based. It is an impressive exercise of *mea culpa*. The commentaries have come in the form of articles, elaborate papers, or

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13 Symposium, *El refuerzo del embargo de Estados Unidos contra Cuba* [*The Strengthening of the United States Embargo Against Cuba*], (July 8-10, 1996)(unpublished manuscript, on file with author)(manuscript contains essays and papers by lawyers participating in the symposium organized by the IRELA (Madrid) and the Center for International Policy (Washington, D.C.), held in Sitges (Barcelona), Spain); Robert L. Muse, *Legal and Practical Implications of Title III of the Helms-Burton Law*, The Strengthening of the United States Embargo Against Cuba Symposium (July 8-10, 1996) (unpublished) (the most vocal U.S. voice); Hermenegildo Altozano, *La Ley Helms-Burton y El Derecho Internacional* [*The Helms-Burton Act and International Law*], The Strengthening of the United States Embargo Against Cuba Symposium (July 8-10, 1996) (unpublished) (expressing similar points from a Spanish point of view); Hernán de Jesús Ruiz Bravo and Manuel Morán Rufino, *La Ley Helms-Burton: líneas de acción para contrarrestar sus efectos extraterritoriales*, The Strengthening of the United States Embargo Against Cuba Symposium (July 8-10, 1996) (unpublished) (a Mexican angle); Nick Mallett, *The Application in the United Kingdom of the Cuban Liberty and Democratic Solidarity Act (LIBERTAD) Act of 1996 of the United States of America*, The Strengthening of the United States Embargo Against Cuba Symposium (July 8-10, 1996) (unpublished) (views of a British attorney); Sergio Alvarez-Mena, III and Daniel A. Crane, *From the Commerce Clause to Café Cubano: The Constitutionality of Helms-Burton*, A.B.A. SEC. INT'L L. (Oct. 23-26, 1996) (a sample of the opposing view and siding with the backers of Helms-Burton presented in the 1996 Fall Meeting of the American Bar Association International Law Section and Inter-American Law Committee); see Noreen Marcus, *Attorneys Capitalize on Anti-Castro Law; Helms-Burton Sparks Suits*, 18 LEGAL TIMES (Washington) 2 (Apr. 8, 1996).

comments presented under the sponsorship of respected U.S. academic and legal institutions or have found the necessary disseminating outlets in U.S. juridical journals.<sup>14</sup>

In this instance, domestic criticism of U.S. foreign policy has not come from liberal academic circles or left-of-center political sectors, but, as it was also the case with the Torricelli Act, from the very nucleus of the U.S. legal establishment. It appears, like the responsible minds of the legal profession thought, that remaining silent on the Helms-Burton Act would be historically interpreted as endorsing a document that respected scholars called "a monstrosity."<sup>15</sup> Two additional dimensions related to the legal commentaries on the Helms-Burton Act are worth noting. First, a scant review reveals an outstanding geographical diversity. The scholarly publications where the studies have appeared are anchored in institutions located in a large number of states. The second is the fact that the topic has attracted the inter-generational attention of law students,<sup>16</sup> established scholars, and practitioners. As a sample of the

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14 As a self-imposed limitation, this comment considers only the scholarly publications abstracted or indexed by two of the most used search indexes available: *Wilson's Index to Legal Periodicals and Legal Resources Index*. published papers made available to the author by legal practitioners. See *supra* note 13.

15 One of the selected epithets bestowed by scholars was spontaneously and graciously offered by Robert J. Goebel, Director of the Fordham Center on European Law, participating in the European Community Studies Association (ECSA) meeting held in Seattle, Wash. (June 1, 1997).

16 Among the authors identified as candidates for law degrees while they were drafting the essays are the following: Craig R. Auge, *Title IV of the Helms-Burton Act: A Questionable Secondary Boycott*, 28 LAW & POL'Y INT'L BUS. 575 (1997); David S. De Falco, *Comment: The Cuban Liberty and Democratic Solidarity (LIBERTAD) Act of 1996: Is the United States Reaching Too Far?*, 3 J. INT'L LEGAL STUD. 125 (1997); Gierbolini, *supra* note 10; Christine L. Quickenden, *Helms-Burton and Canadian-American Relations at the*

interest raised by the Helms-Burton Act in the minds of future law professionals, the record shows that the International Law Students Association<sup>17</sup> organized panels for their annual meetings. More ambitious, the students of the Hastings School of Law held an impressive symposium on this topic and published the proceedings and the papers presented by established scholars including U.S. and Canadian government representatives. This trend reflects two significant facts. First, the topic has become attractive for novel scholars, supposedly encouraged by faculty who have supervised the candidate's research and sponsored their eventual publication. As a consequence, the rigorous review process that these legal journals apply to prospective contributions is a guarantee of the seriousness of the essays.

#### B. *Early Warnings*

In the months following the enactment of the Helms-Burton Act, the pages of legal informative publications appeared to be a reflection and a prediction of what the strictly scholarly journals were going to subsequently generate. The *New York Law Journal* and the *Los Angeles Daily Journal*, among other publications, offered a representative sample of the different points of view on the Helms-Burton Act, with an inclination toward a critical assessment. While some commentators were adamant about the legitimacy of the

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*Crossroads: The Need for An Effective, Bilateral Cuban Policy*, 12 AM. U. J. INT'L L. & POL'Y 733 (1997); Solís, *supra* note 4; and Long *supra* note 7.

17 In 1996, the University of Ottawa Law School held a conference on diverse topics such as the Helms-Burton Act and the problems associated with the principle of extraterritoriality.

conditions imposed on Cuba,<sup>18</sup> others were cautious.<sup>19</sup> Most writers were negative and unleashed an early warning about the international reactions.<sup>20</sup>

Very early in the process, some commentators were very direct in the language they used, playing the role of the prophet. Setting the tone of most of his colleagues, Anthony Solís called the Helms-Burton Act a "bad law"<sup>21</sup> and a "dangerous precedent"<sup>22</sup> that would "undermine the confidence in the international legal order."<sup>23</sup> Luisette Gierbolini, perhaps one of the most direct critics of the law and its consequences, entitled her article *Inconsistency With International Law and Irrationality at Their Maximum*.<sup>24</sup> As a representative sample of the policy-influencing judgment rendered by a substantial number of legal scholars, Theodor Meron and Detlev F. Vagts concluded in a surgically blunt manner: "[w]e urge that, in the interest of keeping the United States in compliance with international law and avoiding unnecessary tensions with our closest allies in

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18 Alberto Luzarraga, *Castro Must Open Regime Before U.S. Opens to Cuba*, 215 N.Y. L.J. 33, at S1 (Feb. 20, 1996).

19 Susan Kohn Ross & John W. Shi, *Sovereignty Matters: The Expanded Embargo Against Cuba*, L.A. DAILY JOURNAL, Sept. 24, 1996, at 7.

20 See Cecil Johnson, *Congress, Isn't This a Parody? Helms-Burton Law Takes Foolish Approach to International Trade*, L.A. DAILY JOURNAL, Nov. 4, 1996, at 6. See, e.g., *Law Against Cuba Will Backfire*, L.A. DAILY JOURNAL, July 23, 1992, at 6 (strengthening of U.S. trade embargo against Cuba); Evelyn F. Cohn & Alan D. Berlin, *European Community Reacts to Helms-Burton*, 218 N.Y. L.J. 24, at S2 (Aug. 4, 1997).

21 Solís, *supra* note 4.

22 *Id.* at 729.

23 *Id.* at 740.

24 Gierbolini, *supra* note 10.

Europe and the Americas, President Clinton again exercise the authority to suspend those provisions of the Act.”<sup>25</sup> These future scholars and established experts were not alone.

### C. *Juridical Dissection*

The varied dimensions of the analyses coincide in some critical aspects, the most important of which coalesce around the topics of the potential violations of treaties and international law, the implications derived from U.S. domestic and constitutional law, and the consequences for judicial procedure.

The main areas of concern can be subdivided into three clusters. The first area of concern is on the Cuban *expropriations*. The main topics focus on the nature of the Cuban properties that were taken by the revolutionary government after 1959 and the subsequent absence of monetary compensation. As a result, claimants expected appropriate restitution as a final result of the embargo. Another issue related to expropriations is the acceptable identification of claimants and the subsequent interpretation of what should be the appropriate citizenship status required by the former owners in order to bring suit. In addition, scholarly attention is given to the nature of foreign investment and the interpretation of the label of “trafficking.”

The second area of concern concentrates on the *domestic consequences front*. Here the first issue is the constitutionality of the law with regard to trade and travel. Second, and more importantly, commentators raise the question of the codification of past measures of U.S. foreign policy with Cuba. The third area of concern centers on the *international consequences*. Experts were keenly attracted to the real nature and the political objectives of the measures. As a consequence, they warn about the implications for international

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25 See Theodor Meron & Detlev F. Vagts, *The Helms-Burton Act: Exercising the Presidential Option*, 91 A.J.I.L. 83, 84 (1997) (advocating suspension of the Act’s provisions which authorize lawsuits by U.S. nationals against foreign entities that “traffic” in property expropriated by Cuba).



relations. Basically, the main issues are the extraterritorial aspects of the law and the alleged violation of treaties and international agreements signed by the United States. In sum, a combined front, (formed by the violation of the state doctrine), the sidetracking of the estoppel concept in interpreting the citizenship of claimants, and the application of extraterritoriality, constitutes a base for claiming that the Helms-Burton Act violates international law. These aspects are examined in detail.

### III. ON PROPERTY AND CITIZENSHIP

#### A. *Trafficking in Stolen Property*

The jurists who endorse the Helms-Burton Act have based their arguments mostly on the evidence that the expected and customary compensation for properties nationalized by revolutionary processes normally have low prospects of ever being satisfied. This, however, is not an anomaly that can be exclusively attributed to the Cuban case. Distinguishing himself as a solitary backer of the law, attorney Brice M. Clagett has denounced the lack of enforcement for these procedures. Due to the "notorious weakness and ineffectiveness of international enforcement mechanisms"<sup>26</sup> and "[b]ecause the jurisdiction of international tribunals is consensual, it is only rarely that a confiscation case can be brought in such a forum."<sup>27</sup> Hence, "[e]spousal of claims by the victims government can take generations to bear any fruit . . ."<sup>28</sup> As to the causes of the Cuban expropriations and the lack of compensation, the fact is that both sides are the

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26 Brice M. Clagett, *Title III of the Helms-Burton Act Is Consistent with International Law*, 90 A.J.I.L. 434, 436 (1996).

27 *Id.* at 436-437.

28 *Id.* at 437.

culprits. The United States never agreed on the initial conditions offered by Cuba and the Castro government has in turn been adamantly presenting counterclaims deriving from the monetary damage inflicted by the U.S. embargo on the Cuban economy.

In any event, with the opening of the Helms-Burton Act to claims potentially presented by Cuban-Americans, scholars have pointed out two main aspects directly emanating from the explicitly stated (punitive and compensatory) monetary objective of the law. The first is that, in principle, the potential body of contention is huge: “. . . all properties on the island with which the government of Cuba is involved in some way are subject to suit . . .”<sup>29</sup> With virtually no private property of any real value, any attempt to deal with any portion of the Cuban economy is subject to legal procedures. The second item is the fact that the law rests “. . . too much on . . . expropriated property.”<sup>30</sup> Furthermore, these properties can be traced back at least two generations<sup>31</sup> causing complicated procedural consequences emanating from successory rights based on different legal systems.

The legislators had a clear intent when they elected to use a loaded label to describe what in normal circumstances is a simple commercial transaction. With the connotation of unethical, criminal, and illegal, the Helms-Burton Act’s use of the word “trafficking” not only has irritated foreign interests, but has also alarmed legal commentators. Andreas Lowenfeld lucidly states that the term chosen by the legislators to illustrate the nature of the trading with such properties is actually “. . . a word heretofore applied in legislation almost exclusively to dealing in narcotics . . .”<sup>32</sup> The

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29 Robert Muse, *supra* note 13, at 5.

30 Andreas F. Lowenfeld, *Congress and Cuba: The Helms-Burton Act*, 90 A.J.I.L. 419, 425 (1996).

31 *Id.* at 433.

32 *Id.* at 425.

problem is that when a deep analysis of the operations contemplated to be considered as "trafficking" is done, the result is that *any commercial activity*<sup>33</sup> in Cuba can in principle be considered as "trafficking." Consequently, any individuals involved in commercial activities could be affected by the implementation of the Helms-Burton Act. This has caused many Spanish lawyers to become alarmed.<sup>34</sup>

The authors of the Helms-Burton Act have attempted to reconcile the Act with the guidelines of the American Law Institute known as the *Restatement (Third) of Foreign Relations Law of the United States of 1984*, but this is considered by scholars as "fundamentally flawed,"<sup>35</sup> since the effect of the damage was caused by the Cuban government, not by the "persons over whom jurisdiction is sought to be exercised."<sup>36</sup> In other words, critics point out that the U.S. is punishing third parties out of frustration because it is unable to obtain any results deriving from the long embargo imposed on Cuba. Therefore, to impose U.S. policies in such a case is considered "unreasonable by any standard."<sup>37</sup>

On the issue of the amount of compensation for the damage caused by dealing with previously expropriated goods, it is obvious that the monetary expectations may be exaggerated and unreasonable. These expectations would hinder the success of the legal process. However, since the real purpose of the law is another, scholars detect that investors will find that. . . the choice is between an ice cream sundae [business in Cuba] and a root canal treatment [expensive court

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33     *Id.*

34     Altozano, *supra* note 13, at 12.

35     Lowenfeld, *supra* note 30, at 431.

36     *Id.*

37     *Id.*

suits and loss of businesses in the United States].”<sup>38</sup> It is for this reason that “the proponents of Helms-Burton are fairly confident that persons who contemplate investing in Cuba or transactions with Cuba will change their minds . . .”<sup>39</sup> This is the *real motive* of the law, an opinion shared by the proponents and the critics alike.<sup>40</sup>

The supporters of the law recognize that the measures are punitive rather than compensatory in nature. As a result, the award should not be “unreasonable or excessive.”<sup>41</sup> However, “even assuming that it could be proven that the damages are not truly compensatory and that the act reaches persons only tangentially involved in the targeted trafficking,”<sup>42</sup> attorneys who justify the law predict that “the remedy conferred would approach the level necessary to be disproportionate for due process purposes.”<sup>43</sup>

In any event, Brice Clagett, an isolated endorser of the law, considers that the controversial Title III “does no injustice to the ‘traffickers’ . . .”<sup>44</sup> He states that “[t]raffickers are fully aware that they are dealing in tainted property;”<sup>45</sup> they “are knowingly taking the risk that the dispossessed owners or aggrieved states might take action . . .”<sup>46</sup> Clagett suggests that “. . . international human rights

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38 *Id.* at 429.

39 *Id.*

40 *Id.*

41 Alvarez-Mena & Crane, *supra* note 13.

42 *Id.*

43 *Id.*

44 Clagett, *supra* note 26, at 437.

45 *Id.*

46 *Id.*

law recognizes that, at least in certain circumstances, a state violates international law when it confiscates the property not only of aliens but of its own citizens.”<sup>47</sup> He claims that one of the reasons for Title III is the “premise that international law in all cases forbids a state to confiscate the property of its national without just compensation.”<sup>48</sup> Extending the blame to justify the overextension of actions bordering the violation of international law, the endorsers of the Helms-Burton Act even place blame on the home states of the companies dealing with expropriated properties in Cuba because confiscation originally meant breaking international law.<sup>49</sup>

B. *Citizenship: A Widened Concept*

Perhaps the most controversial aspect of the Helms-Burton Act, as well as its most fascinating legal detail, is the enlargement of the pool of potential suitors. What began as a selected and registered group of claimants, now theoretically encompasses thousands. This enlargement of the pool originates in the nature of the expropriations, the subsequent trafficking, and the new identification of candidates to bring suits in U.S. courts. The law has opened a Pandora's box with respect to a potential new definition of effective citizenship. It allows Cubans who became U.S. nationals to enjoy the protection of U.S. courts, after a waiting period of two years, to redress damages that were caused *before* obtaining U.S. citizenship. Before entering the legal considerations, let us pause for a moment and hear some early warnings on this new twist that produced a considerable hope

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47 *Id.* at 438.

48 *Id.* at 439.

49 See Brice M. Clagett, *The Controversy Over Title III of the Helms-Burton Act: Who is Breaking International Law-The United States, or the States That Have Made Themselves Co-conspirators with Cuba in Its Unlawful Confiscations?*, 30 GEO. WASH. J. INT'L L. & ECON. 271 (1996-1997).

in the Cuban exile community. Some Cuban-American scholars had expressed considerable concern for this development. Speaking at a conference of Cuban economists in exile, when the bill was discussed in Congress, Ernesto Betancourt, a former director of Radio Martí, faced the issue:

United States national definition would be detrimental to encouraging change inside Cuba [. . .] Castro has been holding sessions throughout the island to raise fear among people that their house and land may be subject to reclamation from those Cubans who have become American citizens after their properties were seized. Without denying the legitimate desire of former owners to regain the holdings, not only for economic reasons but in many cases for sentimental reasons involving childhood and family memories, the question that should be put to them is: is your offering to renounce your claim could encourage the end of the Castro regime, would you insist in getting it back? Perhaps Cubans have changed a lot, but the history of the last decades shows that the much maligned Cuban-American and exile community has been capable of reacting with generosity and willingness to foreign whenever faced with crisis.<sup>50</sup>

Robert Freer, a participant in the same conference, presented an elaborate and most convincing paper justifying many of the legal points of the law. With considerable success, he managed to mute most of the questions about the numerous criticisms that the bill had produced. However, he was adamant on the issue of the extension of

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50 Ernesto F. Betancourt, *Potential Impact of the Helms/Burton Act on Castro's Regime*. PAPERS PRESENTED AT THE FIFTH ANNUAL MEETING ASSOCIATION FOR THE STUDY OF THE CUBAN ECONOMY (ASCE) MIAMI, FLORIDA, AUG. 10-12, 1995.

the nationality privileges: “[t]he U.S. has both a responsibility to initiate advances in international law on the one hand and to be careful not to ‘break the crockery’ on the other.”<sup>51</sup> In logical terms, he recognized that the U.S. legal tradition espouses the notion that “if a man steals from another and a third party knowingly and intentionally takes advantage of that theft to receive or beneficially use the fruits of the theft, that person would be as guilty of that theft as the original perpetrator.”<sup>52</sup> However, while stating that the Helms-Burton Act filled a vacuum in international law, he was not so sure about the consequences.

By allowing individuals who were not citizens of the U.S. at the time their loss occurred to take advantage of this privilege, it deviates from the norm. Those who favor this extension suggest that the action created is not a remedy for the “theft” that occurred when they weren’t citizens years ago, but rather for the “trafficking” that is occurring now when they are citizens and entitled to equal access to our courts.<sup>53</sup>

Echoing the Cuban-American sentiment, Freer stated further:

I am sympathetic to this plea, but I have not been able to sufficiently separate the Cuban right to determine the ultimate property rights as to the own citizens from the “trafficking” issue presented to our courts . . . I question as matter of policy whether is worth the

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51 Robert E. Freer, Jr., *Helms-Burton Myths & Reality*. PAPER PRESENTED AT THE FIFTH ANNUAL MEETING OF THE ASSOCIATION FOR THE STUDY OF THE CUBAN ECONOMY (ASCE) MIAMI, FLORIDA, AUGUST 10-12, 1995.

52 *Id.*

53 *Id.*

potential disadvantage to all of us, including Cuban-Americans, in our world-wide traditional arrangements, should this notion to a remedy for post-confiscation nationals gain wider acceptance<sup>54</sup>.

Nevertheless, once the law was approved and enacted, the legal consequences became obvious. Robert Muse, one of the most vocal legal practitioners opposed to the law, had earlier warned that "constitutional arguments will be advanced by other national-origin groups."<sup>55</sup> This is a case of retroactive privilege generously granted by the law which contrasts with the fact that no similar opportunity is bestowed on former citizens of other countries or regions (e.g., Palestinians and Eastern Europeans). It is an open invitation to lawsuits based on discrimination emanating from ethnic or national origin. On a more concrete level, the 5,911 certified claimants "will see their claims diluted to meaninglessness by virtue of thousands of Cuban American judgments entered against Cuba in the U.S. federal courts."<sup>56</sup> Ultimately, a political side effect of this new scenario that will raise "the specter of this potential liability"<sup>57</sup> is "bound to have an inhibiting effect within the U.S. on any attempted rapprochement with Cuba."<sup>58</sup>

The possibility of long and numerous court proceedings has been theoretically great because the requirements included in Title III permit that all individuals or companies with expropriated properties worth at least \$50,000 may become plaintiffs. Although the figure may seem high, the law interprets the value of the property with

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54     *Id.*

55     *See Muse, supra* note 13, at 11.

56     *Id.*

57     *Id.*

58     *Id.*



generosity including the fair market estimate and interest. This means that approximately 400,000 Cubans who are now citizens of the U.S. may be able to sue those who "traffic" with their former properties, now in the hands of the Cuban state.<sup>59</sup> In contrast, only about 300 U.S. companies or persons could benefit from this law (or better from the Cuba Claims Act of 1964) because many of such properties do not have any real market value.

The bill was called by cynics the Bacardi law, in reference to the emblematic ownership expropriated by the Revolution, and the fact that the bill was lobbied by the families of the former owners and other Cuban-Americans of considerable wealth. However, equating the size of companies and the degree of wealth expropriated with the energy employed in lobbying for the bill is inaccurate. The reality is that large companies and individuals with personal interests were not pleased by the *enlargement* of the potential pool of claimants because this would diminish their opportunities of recovering substantial sums from litigation. An association named the Joint Corporate Committee on Cuban Claims, with legal residence in Stamford, Connecticut, composed of more than half of the companies with certified claims, opposed the enactment of the Helms-Burton Act for precisely this reason.

### C. *Facing a U-Turn: The Estoppel*

Jurists with different legal backgrounds recognize that "the nationality of claims principle is a rule of customary international law."<sup>60</sup> However, because the legislators seemed to want to obtain as

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59 Ann Davis, *Helms-Burton's First Test Comes Soon: Cuban-Americans Lining Up to Sue Foreign Investors in Cuba Under New Act*, 18 NAT'L L.J. 31, at A6 (Apr. 1, 1996) (expectations of Cuban-Americans were not lost in the eyes of legal commentaries and reporting).

60 Robert L. Muse, *The Nationality of Claims Principle of Public International Law and the Helms-Burton Act*, 20 HASTINGS INT'L & COMP. L. REV.

much sympathy as possible, they added another dimension to the already loaded problem of the political objective. In the words of Robert Muse, "[i]n order to achieve a foreign policy objective with respect to Cuba, Congress violated the nationality of claims principle of public international law."<sup>61</sup>

A review of recent history in similar cases reveals the novelty of the Helms-Burton Act. After the passing of the International Claims Settlement Act of 1949, the Commission has never been required by Congress to violate international law by considering the claims of non-nationals at the time of property loss<sup>62</sup>. Until now, the legislators and the President have behaved rather well. "Congress and the Executive Branch have been in consistent accord in rejecting the inclusion of claims of anyone other than U.S. nationals at the time of loss."<sup>63</sup> What both the White House and Congress did not seem to understand is that by performing this consistent, restraining policy, they were not only adhering to a legal process, but creating, "de facto," a law that would later convert any other legal measure into a legally void act. This happens by virtue of estoppel.

In spite of the fact that the U.S. may claim that it is not legally bound by international agreements on the basis of national security or that it feels compelled to redress the injustice of expropriations, an internal legal restraint actually works against this logic. The United States is "estopped" from inserting the Cuban-Americans, who were not U.S. citizens at the time of the expropriations, in the list of candidates capable of filing suits under an activated Title III. Why is this? Because this action would be in contradiction to the principle of estoppel.

Estoppel applies when a person gives a reason to believe

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777, 783 (1997).

61 *Id.* at 797.

62 *Id.* at 785.

63 *Id.*

certain facts upon which another person takes action.<sup>64</sup> The first actor cannot later deny these facts. The estoppel, known as preclusion in civil law systems, derives originally from municipal law. Applied to international law, estoppel is a restraint on a state that in the past, has declared and performed conduct maintaining a given position, and then manifests a decision contrary to this pattern. Since international law can succeed and be respected only if it is based on good faith, any sort of turncoat behavior is considered a violation. Other members of the international community cannot easily accept that a well-patterned doctrine exercised by another state is suddenly and unilaterally considered as void. This situation only creates confusion and the loss of mutual good faith. A party can invoke estoppel "when induced to undertake legally relevant action or abstain from it by relying in good faith upon clear and unambiguous representation by another State."<sup>65</sup> The International Court of Justice has insisted that

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64 This comment does not claim to be authoritative in the scholarly legal field, but only to serve as a bridge between the sometimes too distant specialties of international relations and law. While some of the concepts discussed may be too elementary to legal students (as it is the case of the "estoppel" and the "doctrine of state"), they are not ordinary items in political science or international relations articles.

65 Jorg Paul Müller & Thomas Cottier, Estoppel, in 1 *ENCYCLOPEDIA OF PUBLIC INTERNATIONAL LAW* 116 (Rudolf Bernhardt ed., 1992). As sample of the world-wide treatment of the "estoppel" in juridical publications *see generally* ELISABETH ZOLLER, *LA BONNE FOI EN DROIT INTERNATIONAL PUBLIC* (1977); ANTOINE MARTIN, *L'ESTOPPEL EN DROIT INTERNATIONAL PUBLIC: PRECEDE D'UN APERCU DE LA THEORIE DE L'ESTOPPEL EN DROIT ANGLAIS* (1979); Enrique Pecourt García, *El Principio del "Estoppel" y La Sentencia del Tribunal Internacional de Justicia en El Caso del Templo de Preah Vihear*, 16 *REVISTA ESPAÑOLA DE DERECHO INTERNACIONAL*, 153 (1963); F. Mosconi, *La Dottrina dell' "Estoppel" in Diritto Internazionale*, 45 *RIVISTA DI DIRITTO INTERNAZIONALE*, 388 (1962); Christopher Brown, *A Comparative and Critical Assessment of Estoppel in International Law*, 50 *U. MIAMI L. REV.*, 369 (1996); Megan L. Wagner, *Jurisdiction by Estoppel in the International Court of Justice*, 74 *CAL. L. REV.* 1777 (1986).

the “. . . primary foundation of this principle is the good faith that must prevail in international relations, in as much as inconsistency of conduct or opinion on the part of a state to the prejudice of another is incompatible with good faith.”<sup>66</sup> The principle dictates that a “. . . representing party is barred (‘estopped’ or precluded) . . . from adopting successfully different subsequent statements on the same issue.”<sup>67</sup> As Judge Spenser stated in the classic case of *Temple of Preah Vihear*, “the principle operates to prevent a State contesting before the Court a situation contrary to a clear and unequivocal representation previously made by it to another State . . . ”<sup>68</sup>

The recent history shows a systematic U.S. policy of opposing the expansion of protection of claims to persons who were not citizens at the time of their loss. The President, Congress, and the courts were “undeviating in their adherence to the nationality of claims principle of international law.”<sup>69</sup> Therefore, the sudden inclusion of Cuban-Americans in the pool of potential plaintiffs is not only a pleasant surprise for them, but is also “. . . nothing less than an act of bad faith on the part of the United States in its relations with other nations and it is, as matter of international law, estopped from lending support to such claims.”<sup>70</sup>

Lawyers also apply the estoppel principle to counteract the claims that the Helms-Burton Act is justifiable on the basis that the expropriations were international human rights violations<sup>71</sup>. The U.S.

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66 Muse, *supra* note 60, at 795 (quoting Case Concerning the Temple of Preah Vihear, (Cambodia v. Thail.), 1962 I.C.J. 6 (June 15)).

67 Müller & Cottier, *supra* note 65, at 116.

68 *Id.* (quoting Case Concerning the Temple of Preah Vihear, (Cambodia v. Thail.), 1962 I.C.J. 6 (June 15)).

69 Muse, *supra* note 60, at 795.

70 *Id.*

71 *Id.* at 795-797.

recent legal tradition in this field rests on the *Restatement (Third) of the Foreign Relations Law of the United States*. The list of acts that justify a change of previous legal patterns are: genocide, slavery, murder, disappearance, torture, prolonged arbitrary detention, systematic racial discrimination, and gross violations of internationally recognized human rights.<sup>72</sup> Opponents of the Helms-Burton Act claim that the list does not include "deprivations of property."<sup>73</sup>

In any event, the debate can be maintained as long as the contenders find new dimensions to back their arguments, either on the grounds of national security, ethics, or previous violations of human rights. Innocently one may ask, "[w]hat is wrong with Congress bestowing a U.S. federal lawsuit right on individuals and companies who, it must be emphasized, were *Cuban citizens* that had properties *in Cuba* taken by the *government of Cuba* pursuant to the *laws of Cuba*?"<sup>74</sup> Muse responds "[t]he short answer . . . is that *international law forbids it*" (emphasis added).<sup>75</sup> He further states "[t]he principle of international law that eligibility for compensation requires American nationality at the time of loss is so widely understood and universally accepted that citation of authority is scarcely necessary."<sup>76</sup> Contrary to the insistence of the Helms-Burton authors, Muse is precise: "[m]ay the United States provide support, in the form of Titles III and IV

. . . to the claims of non-U.S. nationals . . . ? The

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72 RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 702 (1987).

73 Muse, *supra* note 60, at 797.

74 Muse, *supra* note 13, at 6.

75 *Id.*

76 *Id.*

answer is an unequivocal 'No.'"<sup>77</sup> In sum, the ultimate problem is that the enactment of the law has produced the additional unwanted result of discouraging investment; "... what we have done in enacting Title III in a form that gives rights of suit to non-U.S. nationals at the time of property loss: We have violated international law."<sup>78</sup>

On the other side, Brice Clagett, justifying this example of collateral damage, defends the expanded citizenship bestowed on Cuban-Americans. He claims that the law is correctly based on the fact that the former Cuban citizens are now U.S. nationals and therefore, "[t]o the extent they are U.S. citizens, the prejudice to them has a substantial effect on the United States."<sup>79</sup> This logic seems to be another interpretation of the concept of espousal. However, critics of the Helms-Burton Act point out that in order to be legally acceptable, the concept of espousal needs to meet certain requirements: (1) U.S. nationality of the claimant; (2) the claimant's continuous ownership; (3) a wrongful act by the accused nation which caused damage, loss or destruction of property; (4) reasonable proof of the value of the loss or damages; (5) exhaustion of all local remedies available in the accused nation; and (6) negation of anticipated defenses to be raised by the accused nation<sup>80</sup>. It is obvious that the case of the Cuban-Americans cannot easily meet the necessary criteria.<sup>81</sup>

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77 Muse, *supra* note 60, at 779.

78 Muse, *supra* note 13, at 8.

79 Clagett, *supra* note 49, at 277.

80 Robert C. Kelso, *Espousal: Its Use in International Law*, 1 ARIZ. J. INT'L & COMP. L. 233, 237 (1982), noted in Quickendon, *supra* note 16, at 749.

81 Quickendon, *supra* note 16, at 749.

Some backers of the legislation are very confident that the law is fair and that it would stand in court. They are even concerned that Cuban-Americans may file suits against the two-year waiting period required for entering their cases in court. This sounds ludicrous, but some lawyers might be tempted to claim that the Helms-Burton Act discriminates against Cuban-Americans by forcing them to wait for a longer period than the rest of the former owners who were citizens at the time of the expropriations. In any event, Alvarez-Mena and Crane believe that Cuban-Americans "will have a difficult time proving that the two-year waiting period is based on ethnicity . . ."<sup>82</sup>

While some endorsers of the law would not want to dwell on this dimension, others have no problems in admitting the direct connection between the convenience of widening the concept of citizenship and the foreign policy concern. It appears as the Helms-Burton Act actually needed all Cuban-American help that it could amass. Briefing the U.S. Senate, one Cuban-American lawyer stated that "[i]nclusion of Cuban-Americans is imperative to accomplish the foreign policy goals . . ."<sup>83</sup> Ironically, an additional side effect of the law was either courted by the legislators or it a welcomed consequence. In any case, this is consistent with a pressing priority of alien residents and the sponsoring of programs to seek their citizenship. The fact is that the widening of the pool not only increased the potential number of claimants, but it has also "invited more Cubans to seek U.S. citizenship . . ."<sup>84</sup> However, while supporters of the law may be satisfied with this prospect, a substantial increase of legal suits could clog the court system and cause

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82 Alvarez-Mena and Crane, *supra* note 13.

83 Muse, *supra* note 60, at 779, quoted in *Cuban Liberty and Democratic Solidarity Act: Hearing Before the Senate Subcomm. on Western Hemisphere and Peace Corps Affairs*, 104th Cong., 1st Sess. 128 ((1995) (statement of Ignacio Sánchez).

84 Solís, *supra* note 4, at 725.

considerable delays in producing effective decisions. Paradoxically, this would, according to Clagett, convert the political objective of instant or speedy satisfaction as virtually obsolete. In sum, as more Cuban refugees become citizens and are enticed to sue, the less the opportunity they will have to receive compensation. However, it is imperative to remember that the goal of the Helms-Burton Act was to discourage investment in Cuba in order to produce an economic deterioration, which in turn would cause the end of the Cuban regime.

#### IV. ON CODES AND STATES

##### A. *Tampering with the Constitution*

Due to the combination of the polemics generated by the Helms-Burton Act and some of its specific details, an area that presents uncertainty is the Act's intrinsic constitutionality. The irony is that until tested in court, this dimension is restricted to mere speculation. Critics aspire that some day a high court will declare the law unconstitutional. Defenders of the law perceive that the constitutionality of the Helms-Burton Act does not appear to be in serious question. Moreover, Alvarez-Mena and Crane, two prominent Miami attorneys, state that the law may be controversial, "but [that] it does not substantially depart in legal form from many of its federal precedents."<sup>85</sup> The reality is that the law as it exists today is only valid at a political level, and has exerted limited influence only through its economic consequences. But from the point of view of the U.S. juridical procedure and legal tradition, its effectiveness remains unproven until tested in court. While Title III remains suspended and Title IV is only applied to a couple of cases of visa denials, the Helms-Burton Act is considered a ghost, until a court acts.

In any event, as it happened in the case of the previous legislation regulating the embargo against Cuba, critics have

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85 Alvarez-Mena & Crane, *supra* note 13, at 18.



denounced the limitation imposed on U.S. citizens. Andreas F. Lowenfeld suggests that the Helms-Burton Act "perverts our immigration and travel laws . . ." <sup>86</sup> It is alleged that the law (Section 102) violates the Constitution's Fifth Amendment, which guarantees freedom of travel to all U.S. citizens.

A different issue, but of parallel and controversial nature, is the threat of denying U.S. entry visas to officers (and their families) of companies that "traffic" with former U.S. properties unduly taken by the Cuban government. It is widely understood and accepted that any state has the right to regulate its borders the way it deems fit. Governments are exercising their sovereignty when they approve laws outlining the requirements for legal immigration and tourist visits.

However, at least two issues have the potential of generating legal procedures leading to the serious questioning of the constitutionality of the law. The first is the connection between the decisions of denying visas and the international commitments of the United States. For example, Canada and the U.S. were already bound by the pre-NAFTA <sup>87</sup> free trade commitments. The denial of visas to Canadian executives may violate this treaty, which is constitutionally binding. American individuals who feel that their constitutional rights have been violated by not having access to Canadian sources, social and economic opportunities and profitable investment, may have valid grounds for filing a suit against the U.S. government.

The second legal concept that may be used at any time to contest the denial of visas is the perturbing fact that the regulation is included in a legal text that, as a whole, may be considered as a violation of international law. In other words, a simple administrative restriction that in normal circumstances may be not only be legal, but reasonable, (denying visas for multiple reasons) may turn out to be a

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86 Lowenfeld, *supra* note 30, at 434.

87 North American Free Trade Agreement.

serious violation of fundamental laws. Thus, it may become unconstitutional because it is a fundamental part of a law that violates international law which is legally binding on the U.S. government.<sup>88</sup> However, critics may discover even better grounds for claiming the unconstitutionality of the law when studying the most basic aspects of the text and its most explicit objectives.

### B. *Codifying the Embargo*

The supporters and opponents of the Helms-Burton Act agree on at least one major area related to the immediate and long range consequences of the law. The Act means something unique: a "codification of U.S. foreign policy."<sup>89</sup> Moreover, the Helms-Burton Act has imposed a foreign policy goal on the U.S. court system. Critics allege that this is a violation of the separation of powers doctrine and an unprecedented case of curtailing the privileges of the President of the United States to conduct foreign policy. In addition, the law codifies a transitory item in the foreign policy agenda by elevating it to the status of federal law. It forces the President to rely on the consent of Congress to modify the previous requirement of the embargo. Furthermore, it conditions its abrogation to the explicit restoration of democracy in Cuba, the political disappearance of Castro himself, and the rebirth of a market economy with a clear set of rules.

Even though the President can, as he did on four previous occasions (June 1996, January 1997, June 1997, and January of 1998), suspend the effective execution of Title III for periods of six months, the political character of the law renders it easily manipulable. For example, when a political change takes place in

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88      María Soledad Torres Macchiavello, *Antecedentes sobre la ley Helms-Burton*, 71 REVISTA DIPLOMACIA 54 (December 1996) (a Chilean view on this issue).

89      Solís, *supra* note 4, at 711.

Cuba, not all of the requirements may be met if the ensuing reforms are slow and progressive, or if the details are not to the liking of the proponents and inspirers of the law. Lowenfeld states that "freezing the details of a program of economic denial as of a given date is unwise. I do not go so far as to say it is unconstitutional, but it does impair the ability of the President to conduct foreign relations."<sup>90</sup> He further warns that the Helms-Burton Act "... hampers the discretion of the executive branch..."<sup>91</sup> and "... purports to micromanage a transition whose contours no one can predict..."<sup>92</sup>

Other scholars signal that this is a case of "growing domestication of American foreign policy."<sup>93</sup> This may be a sign that "... foreign affairs may no longer 'be different'"<sup>94</sup> than other areas, but the real danger is the "... injection of adversarial legalism into the foreign policy decision-making process..."<sup>95</sup> Specialists predict that "[w]ith the continued passage of increasingly bold extraterritorial legislation, the judiciary will be less and less able to maintain a passive role in foreign affairs."<sup>96</sup> As a consequence, the dilemma is "... whether turning the federal courts into weapons of foreign policy

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90 Lowenfeld, *supra* note 30, at 422.

91 *Id.* at 433.

92 *Id.*

93 John Yoo, *Federal Courts as Weapons of Foreign Policy: The Case of the Helms-Burton Act*, 20 HASTINGS INT'L & COMP. L. REV. 747, 776 (1997).

94 *Id.*

95 *Id.*

96 Bret A. Sumner, *Due Process and True Conflicts: The Constitutional Limits on Extraterritorial Federal Legislation and the Cuban Liberty and Democratic Solidarity (LIBERTAD) Act of 1996*, 46 CATH. U. L. REV. 907, 960-961 (1997).

ultimately is in the nation's best interests."<sup>97</sup>

Some experts were definitely bold in their statements on this issue. According to Lowenfeld, ". . . Congress wants to use the courts as instruments in furthering its own foreign policy objectives . . . [and] . . . this is an unhealthy development."<sup>98</sup> He was backed by Solís in this opinion: "[e]xecuting a foreign policy via the U.S. courts is both an abuse of the judicial process and an unwise precedent . . ."<sup>99</sup>

Alternatively, Alvarez-Mena and Crane, speaking as the minority of lawyers who justify the law on the issue of diminishing the president's powers, optimistically opine that ". . . the separation of federal powers, as they relate to foreign affairs, is by no means a well-settled question."<sup>100</sup> They consider that "[u]nlike the War Powers Act, . . . Helms-Burton deals only with areas in which Congress and the President share concurrent power."<sup>101</sup> Alvarez and Crane prefer to believe that the President holds the power to conduct foreign affairs, but ". . . does not hold exclusive power to formulate foreign policy."<sup>102</sup> The difference is subtle: "[the] President has power to administer, but not necessarily to formulate, foreign policy."<sup>103</sup> Following the logic of the Helms-Burton Act, "[d]irecting the President to pursue particular policy objectives pursuant to the United States' existing treaties seems to be an entirely reasonable

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97 Yoo, *supra* note 93, at 776.

98 Lowenfeld, *supra* note 30, at 428.

99 Solís, *supra* note 4, at 724.

100 Alvarez-Mena & Crane, *supra* note 13, at 16.

101 *Id.* at 17.

102 *Id.*

103 *Id.*

exercise of Congressional power.”<sup>104</sup> This is justified on the basis that “. . . the Supreme Court has yet to draw many of the boundary lines between Presidential and Congressional powers in foreign affairs, and because the Constitution itself is relatively silent on these issues, it is impossible to state for certain that Helms-Burton would survive a challenge of the sort raised by the State Department.”<sup>105</sup> However, a confrontation between the Executive and the Legislative powers, something that has not yet happened, is unpredictable.

Still, what jurists and political commentators have noted is the extraordinary precedent in domestic U.S. law of the President handing a major foreign policy decision to Congress. In contrast, the Torricelli Act, at least, provided for carefully calibrated responses in lifting the embargo. The Helms-Burton Act, if totally enacted, would not offer this flexibility.

### C. *Detecting the Real Purpose of Helms-Burton*

Focusing on the possible violation of U.S. law, the generalized scholarly consensus is very critical (with few, sporadic exceptions) of the constitutionality of the Helms-Burton Act. This diagnosis is based on the obvious political objectives of the law taking precedence over juridical and commercial arguments. Some of the most concrete criticisms are blunt and direct, without skirting undiplomatic remarks under the cover of legalese.

For most, the Helms-Burton Act is a “. . . foreign policy exercise thinly disguised as jurisprudence.”<sup>106</sup> It is simply “. . . little more than a foreign policy adorned with the legal equivalent to the

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104 *Id.*

105 *Id.* at 18.

106 Muse, *supra* note 60, at 779.

emperor's clothing."<sup>107</sup> Critical commentators have tried to find some good in the objective, but they have failed. Lowenfeld suggests that "[p]erhaps all of this could be forgiven if the Helms-Burton Act could really bring about liberty and democracy in Cuba. [But] I see no reason to believe that it will do so."<sup>108</sup> This view is shared by others across the Atlantic. Spanish attorney Altozano remembers that an increase in the pressure exerted on the domestic U.S. scene did not have any noticeable impact to provoke change of regime in Cuba.<sup>109</sup>

According to Lowenfeld, it is clear that the aim of the Helms-Burton Act is to ". . . deter nationals of third countries from doing business with and investing in Cuba."<sup>110</sup> In spite of the publicly stated purpose and its selling for electoral purposes, the final objective is not ". . . to compensate investors hurt by the Cuban revolution, but to affect the behavior of persons in third countries . . ."<sup>111</sup> This is the reason why British attorney Nick Mallett warns his prospective clients that the tactic is to ". . . create a psychological perception that to do business with Cuba will subject a non-U.S. businessperson to claims in the U.S. and denial of a U.S. entry visa."<sup>112</sup> Some commentators, in turn, consider this as a positive measure. Saturnino E. Lucio points out that the "U.S. appears to have drawn a 'line in the sand' against Cuba and has now explicitly required foreign persons to essentially choose between the U.S. and Cuba. The obvious conclusion of the U.S. Congress and the President is that

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107 Solís, *supra* note 4, at 740.

108 Lowenfeld, *supra* note 30, at 434.

109 See Altozano, *supra* note 13.

110 Lowenfeld, *supra* note 30, at 426.

111 *Id.* at 427.

112 Mallett, *supra* note 13, at 1.

these foreign persons will prefer to maintain their ties to the United States and consequently foreign investment in Cuba will cease or substantially decline.”<sup>113</sup> From a European point of view, while the actual results are open to speculation and subjective interpretation, the basic objective of discouraging investment is, according to Altozano, already accomplished, just by publishing the law.<sup>114</sup> However, American scholars consider that a review of history shows a prediction of more failure, as far as the ultimate stated goal is concerned — the fall of the Castro regime. Vaughan Lowe sums up the overwhelming logical conclusion: “The lesson apparently inferred from this is that if 36 years of sanctions have proved ineffective to change the Castro regime, we must have more. The wisdom of that policy is not self-evident.”<sup>115</sup>

#### D. *A Thorny Issue: Extraterritoriality*

Critics and endorsers of the Helms-Burton Act agree on the controversial nature of expanding the reach of U.S. courts to cover actions that took place well beyond the American borders. Extraterritoriality has been the battle word even since the passing of the Torricelli Act. Its nature is so obvious that it has not been denied by the sectors behind the approval of the Helms-Burton Act. However, the Act is not only played on a domestic scenario, but it transcends the U.S. borders in a manner that has attracted world attention. It is hardly unique. It looks like globalism also applies to legal dimensions, with the added potential of generating legal

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113 Saturnino E. Lucio, II, *The Cuban Liberty and Democratic Solidarity (LIBERTAD) Act of 1996: An Initial Analysis*, 27 U. MIAMI INTER-AM. L. REV. 325, 342 (1995-1996).

114 See Altozano, *supra* note 13.

115 Vaughan Lowe, *U.S. Extraterritorial Jurisdiction: The Helms-Burton and D'Amato Acts*, 46 INT' & COMP. L. Q. 378, 385 ((1997).

violations. Based on this latest development, commentators point out that “. . . extraterritorial legislation seems to be in vogue.”<sup>116</sup> With a united voice, critics have based their opposition on this issue, a fact that is well taken by foreign attorneys.<sup>117</sup> For Lowenfeld, as for most experts, this is an obvious case of “classical secondary boycott,”<sup>118</sup> which is contrary to international law because it seeks to unreasonably force conduct that takes place outside of the state willing to exercise its jurisdiction.<sup>119</sup> It is clear from the beginning of its text that the Helms-Burton Act “. . . seeks to impose American policy judgments on nationals of friendly foreign states in a manner that is both unlawful and unwise.”<sup>120</sup> This is also reflected by jurists across the Atlantic. In the words of Cambridge University professor Vaughan Lowe, “. . . the United States is usurping the rights of foreign States when it legislates for conduct of foreign persons in foreign countries.”<sup>121</sup>

Legal experts opposed the law, as well as their counterparts in Congress, were aware, at an early stage, that any legislation which deals with implementation across the borders of states is bound to confront the act of state doctrine. For Solís, the doctrine “. . . precludes U.S. courts from inquiring into the validity of public acts that a recognized sovereign power has committed within its own

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116 Solís, *supra* note 4, at 709 (referring to the Helms-Burton Act and the subsequent passage of the Iran and Libya Sanctions Act of 1996, PUB. L. NO. 104-172, 110 Stat. 1541 (codified at 50 U.S.C. § 1701 (1997))).

117 See Altozano, *supra* note 13.

118 Lowenfeld, *supra* note 30, at 429.

119 *Id.*

120 *Id.* at 434.

121 Lowe, *supra* note 115, at 378.



territory.<sup>122</sup> A hundred years ago, the United States Supreme Court inaugurated its long standing adherence to this position with the milestone case of *Underhill v. Hernández*.<sup>123</sup> In *Underhill*, Chief Justice Fuller opined that “[e]very sovereign state is bound to respect the independence of every other sovereign state, and the courts of one country will not sit in judgment on acts of the government of another, done within its own territory.”<sup>124</sup> Its logic is simple: acts of one state cannot be subject to judicial inspection by another state. Therefore, the Helms-Burton Act, according to David de Falco, “. . . violates international law because it does not have a legally accepted basis on which it may apply extraterritorially to acts by foreign nationals on foreign soil.”<sup>125</sup>

A basic understanding of international law teaches that if a state executes something illegal, according to international law, the parties that suffer the damage cannot place the issue at the international level against such state, but can only file claims in the state where the damage was done. In the event that this procedure does not obtain satisfactory results, plaintiffs then can ask their own state to file at the international level the complaint against the violator.<sup>126</sup> In view of this, the Helms-Burton Act is a shortcut for a procedure that has never taken place.

Nonetheless, experience has shown that some acts of a given

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122 Solís, *supra* note 4, at 723 (citing as support RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 444 (1986) and *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398, (1964)).

123 168 U.S. 250 (1897).

124 Solís, *supra* note 4, at 723 (quoting *Underhill v. Hernández* from *Banco Nacional de Cuba v. Sabbatino*).

125 De Falco, *supra* note 16, at 126.

126 See Altozano, *supra* note 13.

state may be contrary to international law or to the policy of another state that suffers such acts. In the landmark case of *Banco Nacional de Cuba v. Sabbatino*,<sup>127</sup> the U.S. Supreme Court declined to apply the doctrine on cases that may violate international law. For this reason, Congress passed the Second Hickenlooper Amendment, amending the Foreign Assistance Act of 1961 and permitting courts to decline the application of the state doctrine if properties of U.S. nationals were taken in violation of international law.<sup>128</sup> Understandably, supporters of the Helms-Burton Act were eager to use this new dimension in their favor, in the event that Congress was also seeking guarantees.

Critics of the Helms-Burton Act recognize that the legislators protected themselves very wisely from potential conflicts between a Title III suit and the act of state doctrine. "The authors . . . dealt with this problem head-on," by declaring that courts would not be able to apply the doctrine and decline action if suits were filed.<sup>129</sup> It is a fact that Congress "does not trust the executive branch, and it does not trust the judicial branch."<sup>130</sup> Susan Long, in the concluding remarks of her study, expressed that ". . . Title III still presents constitutional problems since it expressly requires U.S. courts to disregard the Act of State Doctrine. Such a provision runs in the face of the U.S. Constitution's framework regarding separation of powers and the power of the Executive and Legislative branch to have a final say regarding foreign affairs."<sup>131</sup>

Supporters of the Helms-Burton Act rely on the *Restatement (Third) of Foreign Relations Law of the United States* as justification

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127 376 U.S. 398 (1964).

128 22 U.S.C. § 2370(e)(2)(1994).

129 Lowenfeld, *supra* note 30, at 427.

130 Lowe, *supra* note 115, at 428.

131 Long, *supra* note 7, at 496.

for extraterritoriality. Some forms of extraterritoriality appear to be permissible under Section 402 of the Restatement.<sup>132</sup> Legislators and scholars who support the Helms-Burton Act claim that substantial effects of the expropriations and subsequent actions of the Cuban government have had an impact on the territory of the United States.

Therefore, the implementation of extraterritoriality may seem to be reasonable. Critics of the law counteract that although the problem is that the Cuban government caused the "effect," the punishment, inflicted by the eventual application of the law, lays upon foreign corporations.<sup>133</sup> This means that the Castro government, the real "culprit," is not legally affected.<sup>134</sup>

Lawyers defending the Helms-Burton Act admit that "Congress intended Helms-Burton to apply extraterritorially"<sup>135</sup> because its aim is to prosecute anyone who traffics in confiscated property.<sup>136</sup> They claim that "[t]he Supreme Court has never suggested that the Constitution imposes any limit upon extraterritorial statutes."<sup>137</sup> Notwithstanding the fact that "the Supreme Court has not erected constitutional barriers to extraterritorial application of American law, some of the lower federal courts, the Ninth Circuit in

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132 See Solís, *supra* note 4, at 721 (citing RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 402(1)(c)(1986))("[a] state has jurisdiction to prescribe law with respect to . . . conduct outside its territory that has or is intended to have substantial effect within its territory.").

133 *Id.*

134 *Id.* at 721-722.

135 Alvarez-Mena & Crane, *supra* note 13, at 8.

136 *Id.*

137 *Id.*

particular, have declared some . . . limits.”<sup>138</sup> However, “. . . in the vast majority of cases there will be some slight link to the United States so as to satisfy even the dictates of the Ninth Circuit.”<sup>139</sup>

On the matter of U.S. interference with external affairs, Clagett outlines his arguments in the following manner:

Because of the proximity of Cuba to the United States and the history of relations between the two countries, Cuba's persistence in suppressing democracy, violating human rights, and refusing to satisfy international law claims against it has substantially [sic] impact the United States in a variety of ways, including the recurring crises caused by the flight of refugees. The United States has legitimate interests in bringing these problems to an end. It has reasonably concluded that discouraging foreign investment in tainted Cuban property is an appropriate and proportionate means toward that goal.<sup>140</sup>

E. *Agreements & Conventions: The Violation of International Law*

Exemplary of the tone of both the attitudes and analysis of American scholars and foreign reactions, Meron and Vagt suggest that “[w]hile there are divisions among American international lawyers as to whether they [the Helms-Burton Act and Congress] violate international law, there seems to be general agreement . . . among foreign governments and publicists that they do.”<sup>141</sup> The

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138 *Id.* at 9.

139 *Id.*

140 *See* Clagett, *supra* note 49, at 278.

141 Meron & Vagts, *supra* note 25, at 84.

danger of violating international law was so obvious at the start, that U.S. government officials warned about this very early. During President Clinton's first term, his Secretary of State recommended that he veto the bill, even though President Clinton himself initially resisted to endorse the bill.

In the area of international agreements, it is alleged that Section 103 of the law (and its precursors regarding extraterritoriality) violates the common understanding of international law and different legal instruments signed by the U.S. The array of international networks that include explicit and legally bounding commitments that may be in conflict with the intent or the actual implementation of the Helms-Burton Act is rather large.

On the general area of the United Nations, foreign experts have pointed out to clients and general readers the potential violations of Article 2.1 of the U.N. Charter and Resolution 2625 (XXV) of the General Assembly, regarding principles of international law.<sup>142</sup> The Helms-Burton Act may be in conflict with the decision of the International Court of Justice via its judgment of June 27, 1986, related to the confrontation between the U.S. and Nicaragua<sup>143</sup>.

The International Monetary Fund (IMF) and the World Bank (the twin Bretton Woods institutions) are also affected because the Helms-Burton Act provides that ". . . if any financial institution approves a loan or other assistance to the Cuban government over the opposition of the United States, then the Secretary of the Treasury shall withhold from such institution payment of a corresponding amount . . ."<sup>144</sup> This is a violation of Articles 8 and 9 of the IMF statute and Articles 6 and 10 of World Bank regulations.<sup>145</sup>

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142 Altozano, *supra* note 13, at 6.

143 *Id.* at 7.

144 Lowenfeld, *supra* note 30, at 423.

145 *Id.*

In the inter-American scene, Articles II and XI of the Inter-American Development Bank regulations are also violated on the same grounds. In the most recent regional web created by the U.S., Helms-Burton runs against the entire juridical and trade conceptual basis of the North American Free Trade Agreement (NAFTA), especially Articles 1105 and 1603, and possibly 309.

Finally, the scope of the GATT and the WTO also suffer the consequences of the U.S. decision. Specifically, GATT Article XI would permit various challenges. Moreover, any U.S. use (as Washington has announced) of the Helms-Burton Act as a national security exception threatens the GATT protections of the multilateral trading system. Experts remind that the Helms-Burton uses ambiguous language to discourage foreign business relationships with Cuba.<sup>146</sup> Therefore, potential GATT challenges to the law would include "denial of most-favoured-nation-treatment pursuant to Article I . . . [and] denial of national treatment pursuant to Article III . . ."<sup>147</sup> Finally, even if the U.S. maintains that Cuba is a national security threat, "Helms-Burton employs means of questionable proportionality."<sup>148</sup>

Supporters of the law and the U.S. government's position stress the constitutionality of the Helms-Burton Act and its compliance with the principles of international law. They attempt to justify the potential violations on the basis that "the United States did not relinquish its sovereignty when it signed NAFTA and GATT."<sup>149</sup>

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146 See Riyaz Dattu & John Boscariol, *GATT Article XXI, Helms-Burton and the Continuing Abuse of the National Security Exception*, 28 CANADIAN BUS. L.J., 198, 201 (1997).

147 *Id.* at 202-203.

148 *Id.* at 207.

149 Brian J. Welke, *GATT and NAFTA v. the Helms-Burton Act: Has the United States Violated Multilateral Agreements?*, 4 TULSA J. COMP. & INT'L L. 361, 378 (1997).

In contrast, with the early warnings the U.S. government, in its sparse elaborate public discussions, managed to justify the alleged wrongdoings only on the basis of the expropriating process undertaken by Cuba almost four decades ago. David Kaye, an official representative of the State Department participating in the symposium organized by the Hastings Law School, explained in this manner the logic of Helms-Burton: "it still remains to be shown that international law contains any principle or rule that would deny the United States the right to create such a domestic civil remedy."<sup>150</sup> For Washington, there are still "good reasons" for the Helms-Burton Act: "mass nationalization of property of foreign nationals, carried out in a discriminatory manner, without the provision of an effective domestic remedy to obtain compensation and without the willingness to provide compensation in a negotiated settlement."<sup>151</sup>

## V. A PRICE TO PAY: CONSEQUENCES

### A. *The Political Cost*

As we have seen, the Helms-Burton Act has become a transdisciplinary experience as a result of the analytical scope which has been applied. The law has attracted the attention of political analysts, as well as legal experts. Significantly, both groups coincide in their emphasis on the political consequences of the law, especially in the international area, as a prediction, confirmation, or commentary of what actually took place once several foreign governments or international organizations were compelled to act.

To set the tone, Lowe is very generous in distributing the blame: "problems will continue as long as States persist in using

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150 David Kaye, *The Helms-Burton Act: Title III and International Claims*, 20 HASTINGS INT'L & COMP. L. REV. 729, 745 (1997).

151 *Id.*

businesses as tools of an over-reaching foreign policy, and do so in a manner which displays a cavalier indifference to the constraints of the rules of international law . . .”<sup>152</sup> Converted into foreign policy gurus, lawyers are blunt in their descriptions of future gloomy scenarios. Robert Muse rhetorically asks: “. . . if the United States elects to violate the nationality provision of international claims law today, can it tomorrow condemn with any moral authority a nation which chooses to violate, with respect to U.S. citizens, the full compensation standard of that same body of law?”<sup>153</sup> He believes that “. . . the U.S. and its citizens, both corporate and individual, have a great stake in the effective international rule of law [and that] [to be effective this law must be adhered to by all nations of the world — it is neither right nor ultimately very wise for the United States to do otherwise. The price, in the end, will prove too great for everyone.”<sup>154</sup>

On a day to day level, the application of controversial Title IV presents “practical limitations,”<sup>155</sup> and its enforcement may prove “insurmountable,”<sup>156</sup> as the task of the State Department would prove once the process was set in motion. To compile data about the details of foreign investment in Cuba and the links of companies trafficking with the U.S. would be a very cumbersome task. The sensitive decision of sending warning letters denying visas is a mission that many diplomats would not like to take lightly. Overall, it is a “source of obvious embarrassment to the U.S. State Department”<sup>157</sup> and an

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152     Lowe, *supra* note 115, at 390.

153     Muse, *supra* note 13, at 12-13.

154     *Id.*

155     Auge, *supra* note 16, at 591.

156     *Id.*

157     Lowe, *supra* note 115, at 388.



"expression of a parochial policy of the United States towards Cuba . . . ." <sup>158</sup>

On the other hand, as far as what can be called "international public relations," commentators agree that the sole announcement of the law already has negative side effects for the U.S. because the "[exclusion of foreign nationals on this basis could damage diplomatic relations, interfere with foreign policy objectives, and negatively impact both international business commitments and domestic industries."<sup>159</sup> The image of the United States in these changing times suffers "when U.S. power is brought to bear to enforce a law whose legality among the international community is at least suspect, if not firmly rejected, the legitimacy of both U.S. power and international law are threatened."<sup>160</sup> In sum, the law ". . . breeds resentment toward the United States . . . ." <sup>161</sup>

Experts wonder about the amount of wasted energy and attention that the whole process has generated. They ask about the ". . . hours spent dealing with the extraterritorial aspects . . . ." <sup>162</sup> and insist that it is ". . . undesirable to rest the implementation of foreign policy upon the accidents of private litigation, and to impose the costs of that policy upon random individual and corporate defendants . . . ." <sup>163</sup> The result has been that alternatives attempting to solve the basic problems have been derailed. Lowe denounces that "[t]he determination of the authors of Helm-Burton to enact watertight

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158 *Id.*

159 Auge, *supra* note 16, at 575.

160 Solís, *supra* note 4, at 711.

161 *Id.* at 741.

162 Lowe, *supra* note 115, at 389.

163 *Id.*

legislation has deflected attention away from more pragmatic solutions.”<sup>164</sup>

On a more practical level, taking into account the priorities of today's global economy, experts advise “. . . against taking bold unilateral actions in foreign and trade policy matters at a time when nations are moving toward more interdependent trade arrangements and relying on bilateral and multilateral trade cooperation rather than unilateral mechanisms such as quotas and tariffs.”<sup>165</sup> Ultimately, the United States is the loser. William S. Dodge points out that “[t]he United States’ violation of international law norms . . . has been aggressively challenged by other nations and this, in turn, has pressured the United States towards compliance with international law by suspending the right of action under Title III.”<sup>166</sup> Finally, on this apparently pragmatic solution taken by the administration, Quickendon is particularly unkind: “. . . what good is Title III if political concerns require it to exist in a state of indefinite suspension?”<sup>167</sup> She points out that this “. . . dual position . . . where the United States simultaneously lauds and suspends the provision, only serves to discredit the legislation.”<sup>168</sup> In spite of this warning, President Clinton has done so four times.

B. *Recommendations: Lawyers Counsel on Foreign Policy*

Due to the political nature of the law, the legal community, understandably, has not been able to resist the temptation or the

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164 *Id.*

165 Solís, *supra* note 4, at 710.

166 William S. Dodge, *The Helms-Burton Act and Transnational Legal Process*, 20 HASTINGS INT’L & COMP. L. REV. 713, 726 (1997).

167 Quickendon, *supra* note 16, at 766.

168 *Id.*

compulsion to assess the juridical status of the whole process and its consequences, as well as offer policy recommendations, normally derived from policy-influencing think tanks. A minority of commentators seem to agree with the course taken by Congress in spite of the side effects caused by retaliation because the law is still the most effective way of discouraging investment.<sup>169</sup>

The majority of experts, however, do not share this rosy, isolated view. Some are more blunt than others, but most agree on a cluster of negative perceptions and recommendations to correct the damage. The basic problem, according to the majority of legal experts, is that by discouraging investments the United States has chosen the doubtful mechanism of infringing international norms. With considerable humor, Robert Muse pointed out that allowing such penalties for confiscations is like permitting drivers who find parking spaces filled by pedestrians to run them over.<sup>170</sup> In order to redress this anomaly, the Helms-Burton Act either should be repealed or should be modified.

A number of the analysts believe that the United States needs to be more flexible in its aims toward Cuba. Pragmatism should replace unrealistic objectives. Washington must attempt to form a cooperative arrangement with other nations regarding investment in Cuba and seek the best ways to facilitate a peaceful transition. A detailed reading of some of the commentaries will provide further insight about the arguments of the experts.

Luisette Gierbolini perceives that the law "may backfire"<sup>171</sup> because it has "provided Castro's regime with support from Cubans on the island who otherwise may have risen against the regime."<sup>172</sup>

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169 See Welke, *supra* note 149.

170 Muse, *supra* note 13, at 8.

171 Gierbolini, *supra* note 10, at 319.

172 *Id.*

In her analysis, “. . . Helms-Burton confirms Castro’s rhetoric of the U.S. as an imperialistic, evil neighbor.”<sup>173</sup> As far as the terms of the law, they are “unrealistic,”<sup>174</sup> and “. . . have been drafted by Washington bureaucrats and lobbyists who failed to consider the reality of international relations and who disregarded the importance of consistent U.S. trade policies.”<sup>175</sup> She further states that “. . . the Act must at least be modified and, at best, repealed. If Helms-Burton is not found to be a violation of international law, nothing will stop Congress from passing similar laws in the future. Other countries could follow U.S. steps.”<sup>176</sup>

According to Robert Muse, the law:

. . . must be amended to remedy [this] violation. If the United States persists in a continuing breach of international law it will undermine the global rule of law to the detriment of the citizens of this country. How, after all, can the United States demand compliance with international law by other nations when it is in violation of that very system of law? The short and obvious answer is that it cannot.<sup>177</sup>

The isolation of the U.S. is obvious: “[s]tatutes that expressly flout international law . . . may set a dangerous international precedent. In general, countries do not wish to be perceived as outside the

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173 *Id.*

174 *Id.* at 320.

175 *Id.*

176 *Id.* at 320-321.

177 Muse, *supra* note 60, at 797-798.

international legal system.”<sup>178</sup>

The voices of reason seem to concentrate on the urgency of changing course. Solís thinks that the “. . . best interest of the United States [is] to amend the Act in order to maintain foreign policy consistent with, at the very least, the international legal principles that it recognizes and to show respect for the international agreements and bilateral relationships from which it greatly benefits.”<sup>179</sup> Quickendon advises that “Congress should consider severing Titles III and IV . . .”<sup>180</sup> However, because the U.S. government will lose face if it does not somehow enforce Title III, which is more or less what it has been doing since, “Clinton should consider its permanent suspension.”<sup>181</sup> Other commentators leave the door open to positive alternatives: “. . . [f]lexibility will permit the executive to raise potential violations of international law as justifications for avoiding implementation of certain statutory provisions.”<sup>182</sup>

For other commentators, the right course is a more cohesive and coordinated policy to ameliorate the friction caused by the basic controversial problem (foreign investment in Cuba) and to foster the ultimate political aim (the Cuban process of political transition). For example, instead of implementing isolated measures, the U.S. must try to reconcile its goals with other views “[to retain dignity . . . the United States must successfully obtain concrete measures from both the European and Canadian allies to work with Cuba in the promotion

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178 W. Fletcher Fairey, *The Helms-Burton Act: the Effect of International Law on Domestic Implementation*, 46 AM. U. L. REV. 1289, 1334 (1997).

179 Solís, *supra* note 4, at 712.

180 Quickendon, *supra* note 16, at 761.

181 *Id.* at 762.

182 Fairey, *supra* note 178, at 1333.

of democracy.”<sup>183</sup> Another commentator stated that instead of wasting resources on measures that are “hard to implement,”<sup>184</sup> and losing “precious international political capital,”<sup>185</sup> what is needed is a “diplomatic dialogue.”<sup>186</sup> At the core of the controversy is the innate nature of coercive moves “[b]ecause U.S. sanction laws often are the source of international condemnation and legal challenges, Congress may avoid the legal problems associated with laws such as the Helms-Burton Act by enacting a comprehensive international sanction law.”<sup>187</sup> It is therefore mandatory to “. . .repeal the Helms-Burton Act altogether and formulate a Cuba policy around U.S. principles that reflect sound international legal concepts.”<sup>188</sup> Specifically, there is a need to “replace the current litany with more general principles.”<sup>189</sup>

Fairey bases his arguments on the fact that “[t]he globalization of commerce has resulted in a closer relationship between international and domestic legal systems.”<sup>190</sup> For this reason, in the United States, “. . . lawmakers must understand the consequences of enacting legislation that impinges on international legal

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183 Quickendon, *supra* note 16, at 762-763.

184 Maria L. Pagan, *U.S. Legal Requirements Affecting Trade with Cuba*, 2 TULSA J. COMP. & INT’L L. 289, 314 (1995).

185 *Id.*

186 *Id.* at 315.

187 Fairey, *supra* note 178, at 1333-1334.

188 Solís, *supra* note 4, at 739.

189 *Id.* at 740.

190 Fairey, *supra* note 178, at 1335.

obligations.”<sup>191</sup> In his view, “[t]he Helms-Burton Act provides a good example of a foreign policy sanction law that may have its purpose undermined by the judiciary’s interpretive rules.”<sup>192</sup> One important problem is that “[t]he Act appears to have no purpose without extraterritorial application, but it is textually ambiguous[],”<sup>193</sup> and therefore is open to judicial interpretation. Fairly considers that:

[a]lthough violation of international law comes at a cost, Congress has the domestic authority to decide to pay that price in exchange for what it determines to be important national priorities . . . [In turn], [a]bsent clear congressional intent, however, courts may undermine those priorities. The courts may not have an interpretive role in applying the Helms-Burton Act, because certain provisions never may become effective. However, courts increasingly will face the problems the Act raises. Congress has the legal authority to avoid the problems. Congress also has the legal responsibility to adhere to the international obligations it created.<sup>194</sup>

What the United States needs is a more pragmatic approach to defuse the uncompromising situation caused by the combination of the confrontation with Cuba, the expropriations, the embargo, and the recent legislative measures. Rupinder Hans reminds that “. . . LIBERTAD has been called the dictatorship-enabling act, because it strengthens Castro’s only remaining asset, his capacity to blame the

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191 *Id.*

192 *Id.*

193 *Id.*

194 *Id.*

United States for Cuba's problems."<sup>195</sup> Other observers believe that "[b]y joining the rest of the world in limited trade with Cuba, the United States will remove the smoke screen that Castro is presently using to keep the truth from the Cuban people."<sup>196</sup> Hans recommends that "... the embargo should be replaced by a policy of reconciliation with Cuba, which stands a far better chance of initiating meaningful political change, and also, allows American businesses a chance to invest in a growing economy.

In the long run, cooperation rather than conflict is more likely to achieve change.<sup>197</sup> Therefore, according to Professor David P. Fidler of the Indiana University School of Law, what is needed is a compromise and cooperation:

the United States and its liberal allies use economic interdependence with a vengeance against Castro's struggling regime. This strategy would not condition expanded trade and investment on democratic reforms in Cuba; it advocates for opening the floodgates of capitalism on Castro's rickety regime . . . Recasting liberal realism and liberal internationalism in this way would pit the Marxist dinosaur Castro against the high- powered, fast-moving forces of global capitalism. Castro would have difficulty controlling the consequences of such a liberal strategy.<sup>198</sup>

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195 Rupinder Hans, *The United States' Economic Embargo of Cuba: International Implications of the Cuban Liberty and Democratic Solidarity Act of 1995*, 5 J. INTL. L. & PRAC. 327, 346 (1996).

196 De Falco, *supra* note 16, at 154.

197 Hans, *supra* note 195, at 345.

198 David P. Fidler, *LIBERTAD v. Liberalism: An Analysis of the Helms-Burton Act from within Liberal International Relations Theory*, 4 IND. J. GLOBAL LEGAL STUD. 297, 352 (1997).



Professor Fidler further proposes:

[t]he next convergence has to come on the roles of international organizations and international law . . . A potential convergence can be found in using multilateral fora to negotiate an agreement among liberal States that addresses the controversy in international law exposed by the Helms-Burton dispute . . . [Additionally,] . . . an ethical convergence has to be created. [ . . . ] Clearly, negotiations between the United States and Cuba on a lump-sum settlement for victimized property owners will have to be undertaken as their relations normalize.<sup>199</sup>

The sense of responsibility that some U.S. experts have is so high that they even go out of their way and transcend the customary patriotic barriers. Solís offers unsolicited advice to foreign interests in their confrontation with the United States:

[i]f the Europeans obey the Helms-Burton Act, a dangerous precedent could be set. [ . . . ] The Europeans would be committing utter folly if they neglected to oppose the Helms-Burton Act. Unless Congress ceases to enact the type of extraterritorial legislation that it has . . . passed, the EU would find a great deal more of its foreign and trade policies being written in Washington rather than in Europe.<sup>200</sup>

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199 *Id.* at 352-353.

200 Solís, *supra* note 4, at 729.

## VI. CONCLUSION

Even if it fails to accomplish its political goals and its validity in court is never put to the test, the Helms-Burton Act has already become a case study that will demand continued analysis in law schools in the future. In sum, if testimony of an expert witness would carry weight in influencing the permanent suspension of the law, it could be very well that history would credit the U.S. legal academic community for the demise of the Helms-Burton Act. It remains to be seen that when a case is brought to court under the terms of the Helms-Burton Act, if scholarly opinion (as doctrine from authorities) would have the necessary force to influence the outcome of the judicial decisions. Meanwhile, the outlook seems to be bleak for the prospects of the objectives exposed by the main backers of the law.

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199     *Id.* at 352-353.

200     Solís, *supra* note 4, at 729.